Nos. 17-1717 & 18-18

IN THE

Supreme Court of the United States

THE AMERICAN LEGION, ET AL.,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

MARYLAND-NATIONAL CAPITAL AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* RETIRED GENERALS AND FLAG OFFICERS SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a 93-year-old memorial to the fallen of World War I is unconstitutional merely because it is shaped like a cross.

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BRIEF OF *AMICI CURIAE* RETIRED GENERALS AND FLAG OFFICERS SUPPORTING PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

[1] Petitioners' and Respondents' counsel of record consented to the filing of this brief by filing blanket consents with the Clerk. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* or

Amici curiae are retired general and flag officers of the United States Armed Forces. They are deeply interested in this case because their decades of military leadership have led them to conclude that war memorials serve a vital interest in honoring our fallen and communicating the severe costs of war to the next generation of civil and military leaders. *Amici* took an oath to support and defend the Constitution and believe that the decision below misinterprets the First Amendment to inflict grave harm on important symbols of our nation's military. In *amici*'s judgment, the decision below would threaten the many war memorials that include a cross or other religious symbols. These war memorials must be preserved intact to stand as a beacon to the sacrifice and endurance of our armed forces.

Lieutenant General (Ret.) Michael Gould served in the U.S. Air Force for 38 years. He was the 18th Superintendent of the U.S. Air Force Academy (2009-2013). Before that, he served in a number of positions, including as Director of Operations and Plans, U.S. Transportation Command, Scott Air Force Base, Illinois (2008-2009); Commander, 2nd Air Force (2005-2008); and Air Force aide to the President (1990-1992).

Lieutenant General (Ret.) James H. Pillsbury served in the U.S. Army for 38 years. He retired as the Deputy Commanding General of the U.S. Army Material Command. He served in various positions throughout his career, including Platoon Leader, Company Commander, Battalion Commander, and Assistant Division Commander (Support), 10th Mountain Division (Light).

Lieutenant General (Ret.) William G. Boykin served in the U.S. Army for 36 years. He served 13 years in the

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their counsel, have made a monetary contribution to the preparation or submission of this brief.

Delta Force and five years as the U.S. Deputy Undersecretary of Defense for Intelligence.

Lieutenant General (Ret.) Benjamin R. Mixon served in the U.S. Army for 36 years, commanding the U.S. Army Pacific, the 25th Infantry Division, and the Multi-National Division North in Iraq. He has served in or commanded various units in the 75th Ranger Regiment, 101st Airborne Division, and 82nd Airborne Division.

Vice Admiral (Ret.) William "Dean" Lee served in the U.S. Coast Guard for more than 35 years. He retired as Commander, Coast Guard Atlantic Area, Defense Force East and Department of Homeland Security Joint Task Force-East. He had seven command assignments and served at various units on the Atlantic, Pacific, and Gulf coasts.

Lieutenant General (Ret.) Bruce A. Wright served in the U.S. Air Force for 35 years. He retired as Commander, U.S. Forces Japan and Commander, 5th Air Force, Yokota Air Base, Japan. He was a fighter pilot who had multiple command assignments and served throughout the world.

Lieutenant General (Ret.) Richard "Tex" Brown served in the U.S. Air Force for 34 years. He retired as acting Assistant Vice Chief of Staff, Headquarters, U.S. Air Force. He commanded an operational fighter squadron, a composite wing and fighter wing, and the Air Force Personnel Center.

Major General (Ret.) Cecil Richardson served in the U.S. Air Force for 41 years. He served as a Russian interpreter and intercept operator for six years before being ordained as a chaplain. He served as both Deputy Air Force Chief of Chaplains (2004-2008) and the 16th Chief of Chaplains of the U.S. Air Force (2008-2012).

Major General (Ret.) Thomas G. McInerney served in the U.S. Air Force for 35 years, last serving as Assistant Vice Chief of Staff, Headquarters U.S. Air Force. He

was a fighter pilot who commanded various units including the 3rd Tactical Fighter Wing, Clark Air Base, Philippines and 313th Air Division, Kadena Air Base, Japan.

Major General (Ret.) Gary L. Harrell served in the U.S. Army for 35 years, retiring as the Deputy Commanding General of the Army Special Operations Command. He served in various roles and units throughout his career, including the U.S. Special Forces and 1st Special Forces Operational Detachment – Delta.

Major General (Ret.) Brian I. Geehan served in the U.S. Army for 34 years. He retired as the Director of Logistics, U.S. Central Command and held various commands, including Commander, U.S. Army Special Operations Support Command, Ft. Bragg, North Carolina.

Major General (Ret.) Felix Dupre served in the U.S. Air Force for over 33 years. He retired as Commander, Air Force Operational Test and Evaluation Center. During his career, he commanded an operations support squadron, a fighter squadron, a fighter operations group, and two fighter wings.

Major General (Ret.) Jack Catton, Jr. served in the U.S. Air Force for over 31 years. A command pilot and instructor, General Catton logged over 2,650 flying hours in single-seat fighter aircraft. He commanded at the squadron, group, and wing level with tours in the continental U.S., Europe, and the Pacific. In addition to his operational assignments, he served on the Air Staff, NATO Staff, Joint Staff, and as Inspector General of Pacific Air Forces. General Catton's Air Force career culminated at Air Combat Command as the Director of Requirements, where he was responsible for the definition of operational requirements for the Combat Air Forces and the oversight of 260 modernization programs.

Major General (Ret.) Robert F. Dees served 31 years in the U.S. Army in a wide variety of command and staff positions, culminating in assignments as Assistant Divi-

sion Commander for Operations, 101st Airborne Division (Air Assault) and Commander, Second Infantry Division, United States Forces Korea.

Major General (Ret.) Paul Vallely served in the U.S. Army for 30 years, retiring as the Deputy Commanding General for the U.S. Army Pacific. He served two combat tours in Vietnam and served in many overseas theaters, including Europe and the Pacific Rim countries.

Major General (Ret.) William K. Suter served in the U.S. Army for nearly 30 years, ending his career as acting Judge Advocate General for the U.S. Army. After retiring, he served as Clerk of the Supreme Court of the United States from 1991-2013.

Major General (Ret.) Vernon B. Lewis, Jr. served in the U.S. Army for 29 years. He served in various roles and units, including three tours in Korea and Vietnam, and worked as the Deputy Chief of Staff for Operations in the Pentagon.

Brigadier General (Ret.) James Walker served in the U.S. Marine Corps for 33 years, holding various command and staff positions around the world. His final military assignment was in the Pentagon as the senior military attorney for the Marine Corps.

Brigadier General (Ret.) Orwyn Sampson served in the U.S. Air Force for 32 years. He spent 27 of those years at the U.S. Air Force Academy, where he was involved in all four of the "pillar" mission elements: Instructor and Coach in the Department of Athletics; Assistant AOC and Member of the Military Review Committee with the Commandant of Cadets; Professor and Researcher on the Faculty; and Officer Sponsor of the Cadet Fellowship of Christian Athletes.

Brigadier General (Ret.) Dana Helen Born served in the U.S. Air Force for 30 years. Her last assignment was as Dean of the Faculty, U.S. Air Force Academy. She served in various roles and units, including serving in Af-

ghanistan in support of Operation Enduring Freedom and as a permanent professor of the U.S. Air Force Academy's Behavioral Sciences and Leadership Department.

Brigadier General (Ret.) David B. Warner served in the U.S. Air Force for 30 years, retiring as the Director, Communications and Information, Chief Information Officer, Headquarters Air Force Space Command, Peterson Air Force Base, Colorado. He commanded at the squadron and group levels.

Brigadier General (Ret.) Richard F. Abel served in the U.S. Air Force for 29 years, including as Director of the U.S. Air Force Academy's Admissions Liaisons Office (1972-1973); Director of Public Affairs, U.S. Pacific Command (1975-1978); Special Assistant to the Chairman of the Joint Chiefs of Staff (1978-1980); and Director of Public Affairs, Office of the U.S. Secretary of the Air Force (1980-1985).

Brigadier General (Ret.) Gary M. Jones served in the U.S. Army for over 28 years, including as Commander of the U.S. Army Special Forces Command, Deputy Director of the Central Intelligence Agency's Counter-Terrorism Center, and Commander of the 3rd Special Forces Group (Airborne).

Brigadier General (Ret.) David K. "Bob" Edmonds served in the U.S. Air Force for over 28 years, retiring as Deputy Director for Operations, Operations Team Two, National Military Command Center. He served in numerous flying positions, both as an instructor pilot and operations officer. He led 45 combat missions with the 53rd Tactical Fighter Squadron during Operation Desert Storm.

SUMMARY OF ARGUMENT

Like countless grave markers and memorials to veterans throughout our Nation and overseas, and like the simple wooden crosses that first memorialized the final

sacrifice made by thousands of soldiers, the Bladensburg WWI Memorial uses a cross to reflect the respect and gratitude due our honored dead. History establishes that the military has long used a cross as a nonsectarian symbol of sacrifice. Crosses routinely were used as makeshift burial markers for soldiers who died during the battles of World War I. Across the battlefields of Europe, two wooden beams would identify and dignify the temporary graves of thousands of soldiers. As the war came to its close, those touched by the conflicts saw fit to continue to use the symbol of a cross in tens of thousands of headstones and in larger memorials, including the Memorial at Bladensburg.

The meaning of the Bladensburg WWI Memorial cannot be understood apart from this broader history of the cross symbol as a nonsectarian sign of military remembrance. When placed in historical context alongside the tens of thousands of crosses that have commemorated our fallen for more than a century, the nature of the Memorial is clear. From the time it was erected—seven years after the World War I armistice was signed—through today, the Memorial has served as a nonsectarian symbol of sacrifice honoring the forty-nine men of Prince George's County who fell in the war.

The court of appeals discounted the history of crosses as symbols of military sacrifice and effectively ruled that a ninety-year-old piece of that history must be either razed or defaced. By erroneously ascribing a predominantly religious message to the Memorial, the court of appeals promoted the kind of social conflict the Establishment Clause seeks to avoid. As long as the decision stands, it will endanger hundreds or even thousands of similar monuments and memorials by imputing a sectarian meaning to a universally recognized symbol of military death and sacrifice.

ARGUMENT

I. Monuments In The Form Of A Cross Have Long Been Used To Honor American Soldiers Who Fought And Died During World War I And Subsequent Wars

To assess the message the Bladensburg WWI Memorial conveys, the Court must consider the purpose cross symbols served on the battlefields of World War I, in subsequent wars, and in the memorials that honor the brave soldiers who gave their lives in those conflicts. The terrors of modern warfare and the large-scale loss of life that resulted from those conflicts created a new need to bury and commemorate fallen American soldiers overseas. A simple wooden cross was commonly used to hastily identify and solemnize the place where a soldier had been laid to rest—often the very battlefield where he had fallen. As crosses became widely used overseas as a symbol honoring our fallen soldiers, it became a common symbol of that sacrifice in memorials erected back home. The Bladensburg WWI Memorial, dedicated shortly after the WWI Armistice Agreement was signed, was one of these memorials, created to honor the forty-nine men of Prince George's County who gave their lives for their country. A proper understanding of the history of these memorials should guide the Court.

A. Cross symbols have long been used as battlefield markers and memorials

During World War I, the families of many fallen soldiers preferred that their loved ones remain overseas where they had given their lives.[2] To accommodate these families' wishes, the United States acquired several sites in Europe for the creation of cemeteries that would also

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[2] Major William R. White, Q. M. C., Our Soldier Dead, The Quartermaster Review, May-June 1930, https://www.qmfound.com/article/our-soldier-dead.

serve as fitting memorials for those who had died.[3] While the War Department solicited assistance in designing the final resting places for soldiers, a wooden cross or the Star of David marked their temporary graves.[4] In 1922, the War Department approved a plan to replace these temporary markers with rectangular marble slabs with rounded tops similar to the headstones used in many military cemeteries in the United States. But popular opposition arose to replacing the symbols of sacrifice that had marked the soldiers' temporary graves for over five years.[5] Ultimately, the War Department replaced its former design with marble headstones that resembled the wooden crosses and stars that soldiers had first used to commemorate their fallen brothers. When the cemeteries were completed, each grave was marked by either a cross or Star of David. Soldiers who were neither Christian nor Jewish were memorialized with a cross.[6] The Secretary of War was informed in 1925 that the families of some Reformed Jews preferred "no distinction be made between them and their Christian comrades" and requested that their sons be buried underneath a cross to emphasize their shared cause and sacrifice.[7] A cross, then, was not used solely to commemorate the sacrifice of Christian soldiers.

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[3] Colonel Frederick W. Van Duyne, Q. M. C., Erection of Permanent Headstones in the American Military Cemeteries in Europe, The Quartermaster Review, January-February 1930, https://www.qmfound.com/article/erection-of-permanent-headstones-in-the-american-military-cemeteries-in-europe/.

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

[7] Mrs. Frederic W. Bentley to Dwight F. Davis, Secretary of War, 12 Nov. 1925, quoted in Michael Sledge, Soldier Dead: How We Recover, Identify, Bury, and Honor Our Military Fallen 205 (2007).

Crosses continued to be used as simple and powerful symbols of sacrifice during World War II. On June 8, 1944—two days after the D-Day landings on the beaches of Normandy—the U.S. Army established the temporary United States Military Cemetery at St. Laurent-sur-Mer to bury the thousands of men who died during the daring and costly invasion.[8] A wooden cross marked each grave until it was later replaced with a marble Star of David for soldiers of the Jewish faith or a marble Latin cross for all others.[9] Today over 9,000 such markers cover the Normandy American Cemetery and Memorial, serving as a powerful reminder of the breadth and depth of the sacrifice made by all who served in World War II.[10]

During the Korean War, the United States did not create overseas cemeteries, but instead made great efforts to identify and transport the remains of fallen service members back home while the conflict was still rag-

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[8] WW2 US Medical Research Centre, 607th Quartermaster Graves Registration Company, Unit History, https://www.med-dept.com/unit-histories/607th-quartermaster-graves-registration-company (last visited July 24, 2018). "A few temporary US military cemeteries initially set up included both American and German dead, at first in mixed groups (with white wooden crosses identifying United States military personnel and black crosses for the Germans * * *), later in distinctive fields, and finally in separate cemeteries. Temporary markers were only gradually replaced by permanent crosses on 6 July 1944." *Ibid.*

[9] See *ibid.* for a picture of the wooden crosses at the temporary cemetery; see also American Battle Monuments Commission, Normandy American Cemetery and Memorial, at 10, https://www.abmc.gov/sites/default/files/publications/Normandy_Booklet_4-8-2014_508.pdf (last visited July 24, 2018).

[10] See American Battle Monuments Commission, Normandy American Cemetery and Memorial at 7, https://www.abmc.gov/sites/default/files/publications/Normandy_Booklet_4-8-2014_508.pdf (last visited July 24, 2018).

ing.[11] The Graves Registration Division of the United States Army sent teams of men into the field to locate the remains of their fellow soldiers, many of whom were hastily buried in graves marked by crosses or other markers.[12] The temporary grave markers that were not destroyed by weather, battle, or the enemy greatly aided the Graves Registration personnel in their task of identifying the deceased and returning them home for a burial befitting their sacrifice.[13]

B. This battlefield history is reflected in numerous memorials to fallen soldiers, including the memorial cross at Bladensburg

During and immediately following the battles of World War I, soldiers who survived the carnage deemed crosses fitting symbols to commemorate the sacrifices and mark the resting places of their brothers-in-arms. The families and loved ones of the fallen viewed the widely used symbol in a similar light. While the cross symbol undoubtedly held religious meaning for many, its primary purpose was to identify and solemnize the place where each soldier was laid to rest. When the Bladensburg WWI Memorial was dedicated to the forty-nine soldiers of Prince George's County, Maryland who died in the war, any citizen who had been touched by the conflicts would have immediately understood why a cross was chosen to commemorate that sacrifice.

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[11] LTC John C. Cook, Q.M.C., Graves Registration in the Korean Conflict, The Quartermaster Review, March-April 1953, http://www.qmmuseum.lee.army.mil/korea/gr_korea.htm.

[12] *Ibid.*; Lynn Harold Hahn, Veteran's Memoirs, http://www.koreanwar-educator.org/memoirs/hahn/#SearchRecovery (last visited July 24, 2018).

[13] LTC John C. Cook, Q.M.C., Graves Registration in the Korean Conflict, The Quartermaster Review, March-April 1953, http://www.qmmuseum.lee.army.mil/korea/gr_korea.htm.

Contemporaneous with the creation of the Bladensburg WWI Memorial, the American Battle Monuments Commission (ABMC)—led by General of the Armies John J. Pershing, the leader of the American Expeditionary Force in World War I—created cemeteries and memorials to the thousands of fallen soldiers that were to be buried in Europe after World War I.[14] In addition to the rows of crosses marking the fallen soldiers, each cemetery had a memorial chapel that included Latin crosses and other religious symbols, Stars of David, and military symbols.[15] The memorial chapels stood not only as places of religious reflection, but as a remembrance of the dead and an expression of the nation's gratitude.[16] Upon completion of the memorial chapels, General Pershing promised "that the United States Government has kept and will continue to maintain its trust in perpetuating the memory of the bravery and sacrifices of our World War heroes. 'Time will not dim the glory of their deeds.'"[17]

Many other longstanding memorials to fallen soldiers have incorporated a cross. The Argonne Cross in Arlington National Cemetery, for example, rests among pine trees representing the Argonne Forest where American

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[14] THOMAS H. CONNER, WAR AND REMEMBRANCE 1 (2018).

[15] *Id.* at 87, 92-94.

[16] *Id.* at 94 (quoting inscriptions of chapel memorials, including: "This memorial has been erected by the United States of America as a sacred rendezvous of a grateful people with its immortal dead" (Suresnes and Meuse-Argonne); "This chapel has been erected by the United States of America in memory of her soldiers who fought and died in Belgium during the world war. These graves are the permanent and visible symbol of the heroic devotion with which they gave their lives to the common cause of humanity" (Flanders Field); and "This chapel has been erected by the United States of America in grateful remembrance of her sons who died during the world war" (Somme)).

[17] *Id.* at 116.

servicemen gave their lives during World War I.[18] The Canadian Cross of Sacrifice, also at Arlington, dominates its surroundings with a bronze sword affixed to a 24-foot gray granite cross.[19] It sits directly across the road from the Arlington Memorial Amphitheater, visited by thousands each day who go to honor the Tomb of the Unknowns, which bears the inscription, "Here Rests In Honored Glory An American Soldier Known But To God."[20] The Cross of Sacrifice honors those Americans who joined the Canadian Armed Forces to fight in World War I before the United States entered the war. Dedicated in 1927 on Armistice Day, the monument was later modified to honor those who served in World War II and the Korean War.[21] In addition to these monuments, 114 Civil War monuments include a cross, including two war memorial crosses at Gettysburg. *Trunk* v. *City of San Diego*, 660 F.3d 1091, 1100 (9th Cir. 2011) (Bea, J., dissenting from denial of rehearing *en banc*).

II. Congress Has Recognized The Use Of Crosses To Honor The Fallen

A. Congress has acted to preserve war-memorial crosses, recognizing their vital role in honoring military

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[18] See Arlington National Cemetery, Argonne Cross, http://www.arlingtoncemetery.net/argonne-cross.htm (last visited July 24, 2018) (reflecting that the base of the cross contains the inscription "IN MEMORY OF OUR MEN IN FRANCE 1917-1918").

[19] See Arlington National Cemetery, Canadian Cross of Sacrifice, http://www.arlingtoncemetery.net/canadian-cross.htm (last visited July 24, 2018).

[20] See Arlington National Cemetery, Tomb of the Unknown Soldier, http://www.arlingtoncemetery.mil/VisitorInformation/TombofUnknowns.aspx (last visited July 24, 2018).

[21] See Arlington National Cemetery, Canadian Cross of Sacrifice, http://www.arlingtoncemetery.mil/VisitorInformation/MonumentMemorials/CanadianCross.aspx (last visited July 24, 2018), citing James Edward Peters, Arlington National Cemetery: Shrine to America's Heroes (2000).

sacrifice. For example, Congress found that the Mt. Soledad Veterans Memorial in La Jolla, California—which like the Bladensburg WWI Memorial contains a prominent cross—serves as a "tribute to the members of the United States Armed Forces who sacrificed their lives in the defense of the United States." See Act of Aug. 14, 2006, Pub. L. No. 109-272, § 1(1), 120 Stat. 770. Congress observed that the "Memorial was dedicated on April 18, 1954, as 'a lasting memorial to the dead of the First and Second World Wars and the Korean conflict' and now serves as a memorial to American veterans of all wars, including the War on Terrorism." § 1(2), 120 Stat. 770. And it emphasized that the "United States has a long history and tradition of memorializing members of the Armed Forces who die in battle with a cross * * * *" § 1(3), 120 Stat. 770.

Congress understood that the "patriotic and inspirational symbolism of the Mt. Soledad Veterans Memorial provides solace to the families and comrades of the veterans it memorializes." § 1(4), 120 Stat. 770. Congress had previously designated the Memorial "as a National Veterans Memorial" because of its historical significance as a tribute to our veterans. § 1(5), 120 Stat. 770; see Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, div. J, § 116(a), 118 Stat. 2809 (16 U.S.C. § 431 note) ("The Mt. Soledad Veterans Memorial * * * is hereby designated as a national memorial honoring veterans of the United States Armed Forces.").

The legislation requiring federal acquisition of the Mt. Soledad Memorial received overwhelming support from Congress, the Executive Branch, veterans' groups, and millions of Americans. 152 Cong. Rec. H5383, H5422–H5426 (daily ed. July 19, 2006). It passed the House of Representatives by a 349-74 vote. *Id.* at H5433–H5434. It was unanimously adopted by the Senate. 152 Cong. Rec. S8477, S8550 (daily ed. Aug. 1, 2006).

B. This Court's decision in *Salazar* v. *Buono*, 559 U.S. 700 (2010) reflects another example of Congress's recognition that a cross may appropriately be used as a war memorial. In 1934, WWI veterans erected a simple white cross atop a granite outcrop known as Sunrise Rock in the Mojave National Preserve "as a memorial to soldiers who died in [WWI]." *Salazar*, 559 U.S. at 705–07 (plurality). In 2002, Congress designated the Sunrise Memorial as "a national memorial commemorating United States participation in World War I and honoring the American veterans of that war." *Id.* at 709. "[I]t is noteworthy that Congress, in which our country's religious diversity is well represented, passed this law by overwhelming majorities: 95–0 in the Senate and 407–15 in the House." *Id.* at 727 (Alito, J., concurring).

III. The Court Of Appeals' Decision Threatens The Widespread Use Of The Cross Symbol By The United States Military To Recognize Valor And Memorialize Sacrifice

The court of appeals rested its decision largely on its characterization of the Bladensburg cross as an impermissible "sectarian" or "religious" symbol that necessarily projects a message of religious endorsement. In doing so, the court of appeals rejected evidence of the U.S. military's historical use of a cross to honor and commemorate soldiers and focused monomaniacally on crosses' role as "'the preeminent symbol of Christianity.'" Pet. App. 17a–20a (quoting *Buono* v. *Norton*, 371 F.3d 543, 545 (9th Cir. 2004)).[22] The court of appeals' persistent blindness to the

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[22] See also Pet. App. 2a ("The Latin cross is the core symbol of Christianity."); *id.* at 18a–19a n.9 ("The Latin cross 'reminds Christians of Christ's sacrifice for His people,' and 'it is unequivocally a symbol of the Christian faith.'") (quoting *Weinbaum* v. *City of Las Cruces*, 541 F.3d 1017, 1022 (10th Cir. 2008)); *id.* at 18a ("While the Latin cross may generally serve as a symbol of death and memorialization, it only holds value as a symbol of death and resurrection because of its

physical and historical context of the Memorial cross threatens to disrupt the U.S. military's longstanding use of crosses to honor valor and commemorate the fallen.

A. The history recounted above shows that crosses are frequently used by the military in a way that "need not be taken as a statement of governmental support for sectarian beliefs." *Salazar*, 559 U.S. at 719 (plurality). Moreover, in the United States and around the world, a cross continues to be incorporated into dozens of honorific military medals. The United States military recognizes especially meritorious conduct with the Distinguished Service Cross,[23] the Distinguished Flying Cross,[24] the Navy Cross,[25] and the Air Force Cross.[26] British, Australian, and Canadian soldiers may be awarded the Military Cross[27] and, for acts of most conspicuous bravery, the Victoria Cross.[28] The German Bundeswehr bestows

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affiliation with the crucifixion of Jesus Christ."); *id.* at 27a ("Christianity is singularly—and overwhelmingly—represented.").

[23] See The Institute of Heraldry, Distinguished Service Cross, https://web.archive.org/web/20060516121120/http://www.tioh.hqda.pentagon.mil:80/Awards/DSC1.html (last visited July 24, 2018).

[24] See The Institute of Heraldry, Distinguished Flying Cross, https://web.archive.org/web/20060516121346/http://www.tioh.hqda.pentagon.mil:80/Awards/DFC1.html (last visited July 24, 2018).

[25] See U.S. Department of Defense, Military Awards for Valor – Top 3, https://valor.defense.gov/description-of-awards/ (last visited July 26, 2018).

[26] *Ibid.*

[27] See Ministry of Defence, Military Cross (MC), http://www.mod.uk/DefenceInternet/DefenceFor/Veterans/Medals/MilitaryCrossmc.htm (last visited July 24, 2018).

[28] See Ministry of Defence, Victoria Cross, http://www.mod.uk/DefenceInternet/DefenceFor/Veterans/Medals/VictoriaCross.htm (last visited July 24, 2018).

the Honor Cross for bravery.[29] The Spanish military awards the *Cruz de Guerra*.[30] And the French military awards the famous *Croix de Guerre*.[31]

B. Used in the military context, a cross communicates messages of universal significance that are not limited to a specific religion. When incorporated into medals, a cross communicates that its wearer has performed courageous acts worthy of honor. When erected as part of a memorial to America's veterans, it serves to "honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Salazar*, 559 U.S. at 721 (plurality). Far from communicating a purely or even predominantly religious message, a cross used as part of a veterans' memorial "evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten." *Ibid.*

That a cross may communicate universal or even secular messages is not unusual or unexpected. In other contexts, a cross communicates messages that bear little to no religious meaning. The International Committee of the Red Cross initially adopted a red cross on a white background in 1863 because the symbol was "simple, identifiable from a distance, known to everyone and iden-

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[29] See Germany Awards Military Cross of Courage, Spiegel Online (July 6, 2009), http://www.spiegel.de/international/germany/0,1518,634601,00.html.

[30] See Ministerio de Defensa, *Cruz de Guerra*, https://www.boe.es/buscar/act.php?id=BOE-A-2003-17107 (last visited July 24, 2018).

[31] See The Institute of Heraldry, *Croix de Guerre*, France, https://web.archive.org/web/20060516123717/http://www.tioh.hqda.pentagon.mil:80/Awards/CROIX%20DE%20GUERRE%20FRANCE1.html (last visited July 24, 2018).

tical for friend and foe."[32] Worn as jewelry, a cross is frequently nothing more than a hollow fashion statement. Sewn into a flag, a cross communicates any number of political and nationalistic messages.[33] Set ablaze by members of the Ku Klux Klan, a cross communicates racial intolerance and hatred. See *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring) (noting that erection of a cross by the Ku Klux Klan "is a political act, not a Christian one"). A cross means different things depending on physical and historical context.

C. The court of appeals rejected the long and storied history of the use of crosses as nonsectarian symbols of valor and military sacrifice. Instead, the Fourth Circuit concluded that "the Cross endorses Christianity—not only above all other faiths, but also to their exclusion." Pet. App. 26a.

In effect, the Fourth Circuit concluded that a cross is *necessarily* a sectarian symbol, regardless of context, and that "the display and maintenance of the Cross violates the Establishment Clause." *Id.* at 29a. That categorical approach is contrary to this Court's direction in *Van Orden* v. *Perry* that the message conveyed by a religious symbol displayed on public grounds must be ascertained, in the first instance, from how the symbol is used in light of its surrounding context and history. 545 U.S. 677, 701 (2005) (Breyer, J., concurring in the judgment).

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[32] International Committee of the Red Cross, https://www.icrc.org/eng/resources/documents/misc/emblem-history.htm (last visited on July 18, 2018).

[33] The flag of the United Kingdom, the Union Jack, is actually a combination of three crosses: the cross of Saint George, patron saint of England; the cross saltire of Saint Andrew, patron saint of Scotland; and the cross saltire of Saint Patrick, patron saint of Ireland. The National Park Service, https://www.nps.gov/jame/learn/historyculture/history-of-the-british-flag.htm (last visited July 18, 2018).

The court of appeals turned *Van Orden* on its head by looking to use and context only as factors that failed to ameliorate what the court found to be the inherently sectarian, and constitutionally toxic, message communicated by the Bladensburg Memorial cross.

D. The decision below is an affront to generations of soldiers, their families, and patriotic Americans. As with the memorial cross to World War I veterans that stands alone in the Mojave Desert, the government cannot remove or deface the Bladensburg cross "without conveying disrespect for those the cross [is] honoring." *Salazar*, 559 U.S. at 716 (plurality). *Amici* are part of a long line of men and women who intimately understand the sacrifice recognized by war memorials.

For example, General Pershing told a Gold Star Mother pilgrimage to battlefield memorials in 1931 that they would realize "when they looked out over the white crosses of the cemeteries where their sons and husbands lie, that the sacrifice was not in vain, and that their memories would be tenderly cherished down through the years."[34] Tearing down the Memorial cross would be "viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor." *Id.* at 726 (Alito, J., concurring); see *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment). It would erode the collective memory of the brave soldiers who answered the call to duty in World War I. And it would perversely teach the Nation that a traditional means of commemorating those who died defending the Constitution is repugnant to the very Constitution they died to defend. *Amici* retired general and flag officers urge the Court to forestall that tragedy and correct the court of appeals' stilted view of the First Amendment.

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[34] THOMAS H. CONNER, WAR AND REMEMBRANCE 81-82 (2018).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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